

Supreme Court, U. S.  
**FILED**

SEP 14 1976

MICHAEL RODAK, JR., CLERK

**APPENDIX.**

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976.

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**No. 75-1439**

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JERRY LEE SMITH,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT.**

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**PETITION FOR CERTIORARI FILED APRIL 10, 1976.  
CERTIORARI GRANTED JUNE 21, 1976.**

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## DOCKET ENTRIES

Date	Proceedings
March 26, 1975—	Indictment.
March 26, 1975—	Clerk's Court Minutes (Grand Jury Pre- sentment).
March 27, 1975—	Summons with Marshal's Return.
April 2, 1975—	\$5,000.00 OR bond.
April 2, 1975—	Appearance of counsel.
April 2, 1975—	Clerk's Court Minutes on arraign.
April 2, 1975—	Order setting trial for 4-28-75.
April 25, 1975—	Motion of deft. for continuance.
April 25, 1975—	Order continuing trial.
May 16, 1975—	Appearance of Frerich as counsel.
May 16, 1975—	Order on Omnibus Hearing.
July 10, 1975—	Order setting trial 9-8-75 at 9:30 A.M.
September 8, 1975—	Deft's. Proposed Questions for Prospective Jurors.
September 8, 1975—	Deft's. Trial Brief.
September 8, 1975—	Jury Challenge Sheet.
September 8, 1975—	Clerk's Court Minutes—1st Day of Trial.
September 9, 1975—	Clerk's Court Minutes—2nd Day of Trial.
September 9, 1975—	Instructions to the Jury.
September 9, 1975—	Verdict Forms.
September 9, 1975—	Receipt for Letter from the C. C. A.
September 11, 1975—	Four Subpoenas for the Pltf. with Marshal's Return.
September 16, 1975—	Order Granting the Deft. an Additional 7 Days to File his Motion for New Trial.
September 17, 1975—	Deft's. Motion for a New Trial.
September 18, 1975—	Pltf's. Resistance to Motion for New Trial.
September 18, 1975—	Certificate of Service By Mail.



October 14, 1975—Order Denying Deft's. Motion for a New Trial.

October 14, 1975—Clerk's Court Minutes on Sentencing.

October 14, 1975—Judgment & Commitment.

October 14, 1975—Notice of Appeal by Deft.

October 17, 1975—Order In Re: Deft's. Sentence of Probation.

October 29, 1975—Agreed Statement of Appeal Pursuant to Rule 10(d) FRAP.

October 31, 1975—Transcript of Hrg. Deft's. Motion for Judgment of acquittal, renewal thereof, & ruling of Court. (Loose in file.)

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa.

UNITED STATES OF AMERICA,  
*Plaintiff,*

vs.

JERRY LEE SMITH, d/b/a Intrigue,  
*Defendant.*

Criminal No. 75-46  
(T. 18 U. S. C. § 1461)

INDICTMENT

THE GRAND JURY CHARGES:

*Count I*

That on or about the 1st day of February 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail, according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs which depict nude men and women engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

*Count II*

That on or about the 25th day of June 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a



Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail, according to the directions thereon, to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope with the return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm and advertising literature.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

*Count III*

That on or about the 27th day of June 1974, at Des Moines, in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm and advertising literature.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

*Count IV*

That on or about the 10th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope with the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances that is, a motion picture film entitled "Lovelace" depicting a nude male and a nude female engaged in explicit sex acts of masturbation and simulated sex acts of intercourse, fellatio, and cunnilingus and photographs depicting nude males and females engaged in simulated sex acts of intercourse, fellatio, and cunnilingus.

This is in violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

*Count V*

That on or about the 30th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a motion picture film entitled "Terrorized Virgin" depicting one nude female



and two nude males engaged in explicit sex acts of fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

*Count VI*

That on or about the 30th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

*Count VII*

That on or about the 2nd day of October 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine

entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, bondage, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

/s/ ELDON BOSWELL,  
Foreman.

A true bill.

/s/ (Illegible)  
United States Attorney.



IN THE UNITED STATES DISTRICT COURT.

\* \* (Title omitted in Printing) \* \*

DEFENDANT'S PROPOSED QUESTIONS FOR  
PROSPECTIVE JURORS

1. Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

2. Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(The following individual questions are requested for each juror who answers the above question in the affirmative.)

3. Where did you acquire such information?

4. State what your understanding of those contemporary community standards are?

5. In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity.

6. State what your understanding of those laws are?

FULTON, FRERICHs & NUTTING

616 Lafayette St., P. O. Box 2427  
Waterloo, IA 50705

*Attorneys for Defendant*

By /s/ C. A. FRERICHs

C. A. Frerichs

IN THE UNITED STATES DISTRICT COURT.

\* \* (Title omitted in Printing) \* \*

DEFENDANT'S TRIAL BRIEF

1. The definition of obscenity is not a question of fact, but one of law; the word "obscene" as used in 18 U. S. C. Section 1461 is a legal term of art.

*Hamling v. United States*, 94 S. Ct. 2887, 2908 (1974)

2. The first standard for testing the constitutionality of legislation regulating obscenity is whether the average person, *applying contemporary community standards*, would find that the work, taken as a whole, appeals to the prurient interest.

*Miller v. California*, 93 S. Ct. 2607 (1973)

3. In defining obscenity, 18 U. S. C. Section 1461 incorporates the *Miller* test of the "average person", applying contemporary community standards.

*Hamling v. United States*, 94 S. Ct. 2887, 2901 (1974)

4. A principal concern in requiring that a judgment as to obscenity be made on the basis of "contemporary community standards" is to insure that the material is judged neither on the basis of each juror's personal opinion or by its effect on a particularly sensitive or insensitive person or group.

*Hamling v. United States*, 94 S. Ct. 2887, 2902 (1974)

5. In obscenity case tried in Federal District Court, a judicial district is the "community", in which the jurors will draw in determining contemporary community standards.

*Hamling v. United States*, 94 S. Ct. 2887, 2901 (1974)

6. Although not required as a matter of constitutional law, the State of Iowa can constitutionally proscribe obscenity in terms of a "statewide standard".

*Miller v. California*, 93 S. Ct. 2607 (1973)

*Hamling v. United States*, 94 S. Ct. 2887, 2901 (1974)



7. The State of Iowa by the enactment of Chapter 725 of the Iowa Code, adopted statewide "community standards" for the determination of obscenity.

Chapter 725, Code of Iowa

8. Sections 725.1, 725.2 and 725.3 of the Code of Iowa set forth the "community standards" that the judgment of whether materials are obscene or not is dependent on the circumstances surrounding the dissemination of the materials rather than a subjective community judgment on the contents of the materials.

Sections 725.1, 725.2 and 725.3 of the Code of Iowa

9. Section 725.9 of the Iowa Code specifically excludes the application of any other "community standard" other than the circumstances of the materials dissemination standards set forth in Chapter 725 in determining the question of obscenity in the State of Iowa.

Section 725.9, Code of Iowa

10. A federal court is prohibited from allowing a jury to base an obscenity decision on a "community standard" other than those "community standards" specifically enunciated by a state by constitutional mandate of the 10th Amendment which reserves such police powers to the State.

10th Amendment to the United States Constitution

11. When a criminal defendant's guilt or non-guilt of a crime depends on a jury's independent knowledge of what the contemporary community standards are within the judicial district in which the jury is sitting, due process requires that the defendant be able to inquire whether a prospective juror has any such independent knowledge of said contemporary community standards and whether that knowledge is correct or not.

14th Amendment to the United States Constitution

12. When a criminal defendant's guilt or non-guilt of a crime depends on a jury's independent finding of what the

community standards are within the judicial district in which the jury is sitting, due process entitles a criminal defendant to ascertain at the time of the jury selection just what community standard the jury will apply at trial.

14th Amendment to the United States Constitution

FULTON, FRERICHS & NUTTING

616 Lafayette St., P. O. Box 2427

Waterloo, IA 50750

*Attorneys for Defendant*

By /s/ C. A. FRERICHS

C. A. Frerichs



## UNITED STATES DISTRICT COURT

\* \* (Title Omitted in Printing) \* \*

## JURY TRIAL

On this 8th day of September, 1975 this case came on for 1st day of trial and the issues having been duly presented to the Court and Jury by Allen L. Donielson and Paul A. Zoss attorneys for the Plaintiff and C. A. Frerich Attorneys for the Defendant and the Court being fully advised in the premises,

It Is Ordered and Adjudged as Follows: Court in session at: 9:50 A.M. Jury impanelled. The Jury was admonished by the Court. Opening Statement by Counsel for both Parties. In absence of the Jury. Legal matters discussed. Deft. made a Motion In Limine. Pltf. responded. The Court ruled evidence in re: Cts. 2 and 3 are admitted. The remaining evidence is limited. Evidence for Pltf. proceeded with and in absence of the Jury. Legal Matters discussed. With the Jury present. Pltf's. evidence resumed and concluded. Pltf. rests. Deft's. evidence proceeded with the right to make Motions later on Court recessed at 4:35 P.M. until 9:30 A.M. Sept. 9, 1975.

/s/ LEON T. MANN,  
Deputy Clerk

## UNITED STATES DISTRICT COURT

\* \* (Title Omitted in Printing) \* \*

## JURY TRIAL

On this 9th day of September, 1975 this case came on for 2nd day of trial and the issues having been duly presented to the Court and Jury by Allen L. Donielson and Paul A. Zoss Attorneys for the Plaintiff and C. A. Frerich Attorneys for the Defendant and the Court being fully advised in the premises,

It Is Ordered and Adjudged as Follows: Court in session at: 9:25 A.M.

In absence of the Jury Deft. Moved for Judgment of Acquittal. The Court overruled the Motion. Other Legal Matters also discussed. With the Jury present. Deft's evidence resumed and Stipulation by Counsel in re: Deft's Exhibits H, I, J, K, L & M. Deft. rests and reserved the right to make Motions at a later time. Closing Arguments by Counsel. Court's Instructions to the Jury. Alternate Juror was excused. Jury retired to deliberate at 3:30 P.M. Deft. renewed his Motion. Motion overruled by the Court. The Jury returned with their Verdicts at 6:15 P.M. Verdicts of Guilty on all 7 Counts. The Jury was Polled. The Court Ordered a Pre-Sentence Report. Continued on same Bond. Sentencing set for Oct. 6, 1975, at 1:30 P.M. Instructions Filed. Verdicts Filed. (List of Exhibits attached Filed)

/s/ LEON T. MANN,  
Deputy Clerk

Pltf. Witnesses	Pltf. Exhibits	O A
1. John Funaro, Clerk P.O.	1. P. O. Box Appl.	✓ ✓
2. William Bell, Custodian of Records P. O. 1971	2. App. for Mail Permit #271	✓ ✓
3. Walt Anderson (Knows def. & mail under permit)	3. Mailing under Permit #271	✓ ✓



4. Stewart Schwab (Count 1) Postmaster Guthrie Center
- (Count 3)
4. Original Mailing to John Leffler √ √
- 4A. May—Intrigue √ √
5. Money Order for Sub. √ √
6. Envelope to Leffler √ √
- 6A. Intrigue Magazine √ √
- 6B. Modern Miss √ √
- 6C. Confidential New √ √
- 6D. Model Directory √ √
- 6E. Correspondence Exchange √ √
- 6F. Provocative √ √
- 6G. Linda Lovelace √ √
- 6H. Group Sex √ √
- 6I. Vibro-Stim Penis √ √
- 6J. 200 Explicit √ √
- 6K. Hard Acts √ √
- 6L. This Note √ √
- 6M. Sizzling Books √ √
- 6N. Sensational √ √
- 6O. Linda Lovely √ √
- 6P. European Porno √ √
- (Count 6)
7. Envelope-Leffler √ √
- (Count 7)
- 7A. Intrigue √ √
8. Envelope-Leffler √ √
- 8A. Magazine Intrigue √ √
- 8B. Hard Action
- 8D. Sizzling Books
- 8E. Envelope
- 8F. Precision Crafted
- 8G. Sensational New
- 8H. Low Sale
- 8I. Over 3000
5. W. R. Willige Foundation or Ex. No. 4 only
6. Marion Euritt, P. O. Mt. Ayr (Count 2)
9. Money Order √ √
10. Envelope-Weber √ √
- 10A. Magazine-Intrigue √ √

- 10B. European Porno √ √
- 10C. Group Sex √ √
- 10D. Sensational √ √
- 10E. 200 Explicit √ √
- 10F. Linda Lovely √ √
- 10G. Provocative √ √
- 10H. Lovelace √ √
- 10I. Intrigue √ √
- 10J. Application √ √
- 10K. Vibro-Stim Penis √ √
- 10L. Sizzling Books √ √
- 10M. Hard Action √ √
- 10N. New √ √
- 10O. Model Directory √ √
- 10P. Correspondence Exch. √ √
- 10Q. Modern Miss √ √
- 10K. Thank You √ √
- (Count 4)
11. Money Order—Jerry Weber √ √
12. Film Envelope √ √
- 12A. Film Box √ √
- 12B. Film √ √
- 12C. Three people picture √ √
- 12D. Three people picture √ √
- 12E. Two people picture √ √
- 12F. Two people picture √ √
- 12G. Four people picture √ √
- 12H. Two people picture √ √
- 12I. Linda Lovelace √ √
- 12J. Linda Lovelace √ √
- (Count 5)
13. Money Order—Jerry Weber √ √
14. Film Envelope √ √
- 14A. Film Box √ √
- 14B. Film √ √
- 14C. Picture √ √



7. Tom Bates

Contents Count 1-Ex. 4  
 Contents Count 2-Ex. 10  
 Contents Count 3-Ex. 6  
 Contents Count 4-Ex. 12  
 Contents Count 5-Ex. 14  
 Contents Count 6-Ex. 7  
 Contents Count 7-Ex. 8

(Count 2)

15. Screw No. 259  
 Then offer all except  
 1, 2 & 3

Court Exhibit

1. Letter 8/18/72    √ √  
 (Not to Jury)

Deft. WitnessesDeft. Exhibits    O A

1. William Perry

A	Paper sack	√	√
A-1	Porno Magazine	√	√
A-2	Porno Magazine	√	√
A-3	Porno Magazine	√	√
B	Paper sack	√	√
B-1	Film	√	√
B-2	Film	√	√
B-3	Porno Magazine	√	√
B-4	Porno Magazine	√	√
C	Paper sack	√	√
C-1	Film	√	√
C-2	Publication	√	√
D	Paper sack	√	√
D-1	Publication	√	√
E	Paper sack	√	√
E-1	Publication	√	√
F	Paper sack	√	√
F-1	Publication	√	√
F-2	Publication	√	√
G	Copy of Chap. 725 Iowa Code	√	√
H	News Ad	√	√
I	News Ad	√	√
J	News Ad	√	√
K	News Ad	√	√
L	News Ad	√	√
M	News Ad	√	√

## IN THE UNITED STATES DISTRICT COURT.

\* \* (Title Omitted in Printing) \* \*

## INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury, the Court gives you the following instructions.

## INSTRUCTION No. 1

Now that you have heard the evidence and arguments the time has come to instruct you as to the law governing this case. You are to consider all of the instructions together and apply them as a whole to the facts as you find them to have been established by the evidence and return your verdict accordingly.

You as jurors are the sole judges of the facts. No language used by the Court in these instructions and no statements, conduct, remarks, or rulings of the Court during the progress of the trial should be considered by you as an indication that the Court has any opinion as to the facts of the case or what your verdict should be.

You are to follow the instructions now given you in your deliberations. You are not to be concerned with the wisdom of any rule of law. Regardless of your opinion as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

## INSTRUCTION No. 2

In this case a Federal Grand Jury has returned an indictment against the defendant, Jerry Lee Smith d/b/a Intrigue, charging as follows:

*Count 1*

That on or about the 1st day of February 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith,



d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs which depict nude men and women engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

#### *Count II*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 25th day of June 1974 he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

#### *Count III*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 27th day of June 1974 he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

#### *Count IV*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. § 1461 in that on or about the 10th day of July 1974, he mailed certain nonmailable matter, that is, a motion picture film entitled "Lovelace" to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

#### *Count V*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461

and 2 in that on or about the 30th day of July 1974, he mailed certain nonmailable matter, that is, a motion picture film entitled "Terrorized Virgin" to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

#### *Count VI*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 30th day of July 1974, he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

#### *Count VII*

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 2nd day of October 1974 he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

To this indictment the defendant has entered a plea of not guilty which places upon the Government the burden of establishing the guilt of the defendant beyond a reasonable doubt.

#### INSTRUCTION NO. 3

An indictment is but a formal method of accusing a defendant of a crime, and should not be considered by you as evidence in arriving at your verdict. A defendant is presumed to be innocent of the charge and this presumption of innocence remains with the defendant unless and until he is proven guilty beyond a reasonable doubt. The defendant is not called upon to prove his innocence.

The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant.



## INSTRUCTION No. 4

You will have observed that in the indictment the phrase "on or about" a certain date is used. It is not necessary that the Government prove the act to have occurred on that exact date. It is necessary in that connection only that the act be proved to have occurred within a reasonable time before or after that date.

## INSTRUCTION No. 5

A reasonable doubt of guilt means a doubt founded upon reason and common sense. It means a doubt which, without being sought after, fairly and naturally arise in your mind after a fair and candid consideration of all of the evidence or lack of evidence. It is a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be of such convincing character that a reasonable person would be willing to rely and act upon it unhesitatingly. It does not mean a forced or strained or unnatural doubt, or one arising from sympathy. Proof of guilt to a mathematical certainty or beyond the possibility of a doubt is not required. If upon full consideration of all the evidence or lack of evidence pertaining to the charge, you do not feel a confidence amounting to a moral certainty that the defendant is guilty, then you should acquit the defendant. If, however, after a full consideration of the evidence, you have an abiding conviction amounting to a moral certainty that the defendant is guilty, then the Government has established its case beyond a reasonable doubt.

Whenever in these instructions it is stated that the Government must "establish" a certain matter or proposition, or "prove" a certain matter or proposition, it means that the Government must establish such matter or proposition beyond a reasonable doubt.

## INSTRUCTION No. 6

Section 1461 of Title 18 of the United States Code provides in part that:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance \* \* \*

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared \* \* \* to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, \* \* \*

shall be guilty of an offense against the laws of the United States.

## INSTRUCTION No. 7

Three essential elements are required to be proved beyond a reasonable doubt for each count of the indictment in order for the Government to establish the offenses charged:

First: That the subject matter of the particular count under consideration is obscene, as will hereinafter be defined.

Second: That for each count of the indictment, the accused willfully deposited or caused to be deposited, the envelopes and packages containing the advertisements, pictures and films, for mailing and delivery by the Post Office Establishment of the United States; and

Third: That for each count of the indictment, the accused had knowledge of the contents of the envelope at the time it was deposited for mailing and delivery.

## INSTRUCTION No. 8

Although the indictment includes the words of the statute, namely, the adjectives "obscene", "lewd", "lascivious", "indecent", and "filthy", the gist of the offense alleged in the indictment is the charge that the defendant willfully misused the United States mail for the delivery of obscene materials.

"Obscene" means something which deals in sex in such a manner that the predominant appeal is to prurient interest. A



prurient interest is a morbid interest in sex as distinguished from a candid interest in sex.

In determining whether the subject matter of the count under consideration is obscene as thus defined you must apply the following tests: (a) whether, the average person, applying contemporary community standards would find that the subject matter, taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated or patently offensive representations of masturbation, excretory functions or lewd exhibition of the genitals, and (c) whether the subject matter taken as a whole lacks serious literary, political or scientific value.

If in applying these tests to the subject matter of the count under consideration, you find a yes answer to each question, you will then have found that such matter is obscene and you will consider the other essential elements of the crime. If your answer is no as to any of the tests then the matter is not obscene within the definition given you and you should acquit the defendant.

#### INSTRUCTION No. 9

The phrase "average person, applying contemporary community standards" as used in test (a) in the preceding instruction requires some explanation. The community with which we are concerned is coextensive with the jurisdiction of this Court, roughly that part of the State of Iowa lying south of U. S. Highway 30.

Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. In determining the view of average persons of that community, you are each

entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence.

What may appear to some people to be in bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material in question here is not the proper basis for a determination whether or not the material is obscene. As stated above the test is how the average person of the community as a whole would view the material.

#### INSTRUCTION No. 10

The third test to be applied, in determining whether advertisements, pictures and films are obscene, is whether when taken as a whole, they lack serious literary, artistic, political or scientific value. If they have serious literary, artistic, political or scientific value, then they are not obscene, even though they may appeal to prurient interest in sex in a manner substantially beyond the acceptable limits of candor established by the current standards of the community as a whole.

#### INSTRUCTION No. 11

Freedom of expression is fundamental to our system, and had contributed much to the development and well being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene.



## INSTRUCTION No. 12

If you find that the material named in the indictment is obscene as defined in Instruction 8, and if you find that the defendant deposited the material in the mail knowing or having notice at the time of its contents, the offense is complete, although the defendant himself did not regard the material as being forbidden by law to be carried in the mails.

## INSTRUCTION No. 13

The offense charged in the indictment is that the accused willfully deposited, or caused to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, packages and envelopes containing one or more obscene pictures, addressed to the addressee named.

Proof as to willfully depositing, or causing to be deposited, for mailing and delivery, may be wholly circumstantial. The evidence need not show that the accused personally mailed the packages and envelopes in evidence. As to the alleged misuse of the mails, it is enough if the evidence in the case established beyond a reasonable doubt that the accused willfully caused the deposit for mailing or delivery of packages and envelopes containing one or more obscene advertisements, pictures and films, as charged in the indictment.

## INSTRUCTION No. 14

An act is done knowingly if done voluntarily and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one would be convicted for an act done because of mistake, accident, or other innocent reason.

## INSTRUCTION No. 15

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye-witness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

## INSTRUCTION No. 16

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While eye-witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. Thus, upon considering all the evidence adduced at trial, the jury may, but is not required to, draw the inference that an accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

In determining the issue as to intent the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.



## INSTRUCTION No. 17

The matter of the punishment of the defendant in the event of conviction should not be taken into consideration by you. This is the responsibility of the Court and not the jury. It is your duty to determine whether the defendant is guilty or not guilty. It is the duty of the Court to determine what his punishment should be in case of conviction.

## INSTRUCTION No. 18

You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved. In passing on the credibility of the witnesses and in weighing their testimony you may and should consider their appearance and conduct on the witness stand; their interest or lack of interest in the result of the trial; the motives, if any, actuating them as witnesses; their candor, fairness, bias, or prejudice; their knowledge, recollection and means of knowledge of the matters whereof they speak; the reasonableness or probability of their statements, or want thereof; and each fact and circumstance proved, thus giving to the testimony of each witness and to each fact and circumstance such weight and such only as ought reasonably and justly to be given in view of all the evidence.

## INSTRUCTION No. 19

A defendant in a criminal case may take the witness stand in his own behalf or he may elect not to take the witness stand. In this case the defendant elected not to take the witness stand. The decision not to take the witness stand does not create any presumption against the defendant. You should not permit the fact of such decision to weigh in the slightest degree against the defendant, nor should you permit such fact to enter into your deliberations and discussions. Such a decision is merely an exercise of a defendant's constitutional right to remain silent.

## INSTRUCTION No. 20

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. An inconclusive trial is always undesirable. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

## INSTRUCTION No. 21

Upon retiring at the close of the case your first duty is to elect a foreman. The foreman acts as chairman. It is his duty to see that discussion is carried on in an orderly and proper fashion, that the issues are fully and freely discussed, and that every juror is given an opportunity to express his views. When ballots are to be taken, he will see that it is done. He will sign the forms of verdict which are in accord with your decision. He will sign any written requests made by the jury to the Court. Requests regarding instructions are not encouraged. Experience teaches that questions regarding the law are normally fully covered in the instructions and the jury is encouraged to examine them very carefully before making any further requests of the Court. The masculine gender has been used for convenience, but either a man or a woman may be foreman of the jury.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the



jury room, to announce an emphatic opinion in a case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and the juror may later hesitate to recede from an announced position even when it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth.

/s/ (Illegible)

*United States District Judge*

#### INSTRUCTION NO. 26

Submitted to you with these instructions are two forms of verdict for each of the seven counts of the indictment. You are to consider the guilt of the defendant as to each count separately, and have your foreman sign the appropriate form for each count.

#### IN THE UNITED STATES DISTRICT COURT

\* \* (Title Omitted in Printing) \* \*

#### MOTION FOR A NEW TRIAL.

Defendant moves the Court to grant him a new trial for the following reasons:

1. The Court by adverse rulings to Defendant's requested questions to the Jury panel refused to make inquiries whether prospective jurors had any knowledge of the contemporary community standards referred to in *Miller v. California* and *Hamling v. United States* and whether that knowledge if any, was correct or not. Further the Court advised counsel that he would refuse counsel the right to make such inquiries.

2. The Government in the prosecution of this case submitted only evidence showing the mailing and receiving of certain materials in the mail.

3. The Government produced no evidence purporting to show what the contemporary community standards referred to in *Miller v. California* and *Hamling v. United States* are for the United States District Court for the Southern District of Iowa.

4. Defendant introduced into evidence in this cause Chapter 725 of the Code of Iowa which set forth community standards for the State of Iowa. Said legislation provides that in the geographical area of the State of Iowa "obscenity" is a function of circumstances of the materials dissemination.

5. The Government produced no evidence showing Defendant's violation of the community standards set forth in Chapter 725.

6. For the above reasons the Government has wholly failed to sustain its burden of proof showing that the materials cited in the indictment offend the community standards of the United



States District Court for the Southern District of Iowa and accordingly has failed to sustain its burden of proof in this case as a matter of law.

7. Further, if the community standards for the United States District Court for the Southern District of Iowa are in fact different from that community standards set out in Chapter 725 of the Iowa Code, a judgment of guilty in this matter offends due process in that Defendant was unable to ascertain whether a community standard existed in the minds of the jurors and if it existed, what it was and if it was correct and was therefore precluded from being able to present a fair defense to the accusations of the Government under the doctrine announced in *Chambers v. Mississippi*.

FULTON, FRERICHS & NUTTING,  
Attorneys for Defendant,  
616 Lafayette St.,  
Waterloo, Iowa,

By: /s/ C. A. FRERICHS,  
C. A. Frerichs.

Copy sent to:

US Attorney Allen Donielson, US Federal Courthouse, East 1st  
& Walnut St. Des Moines, Iowa 50309

IN THE UNITED STATES DISTRICT COURT

\* \* (Title Omitted in Printing) \* \*

# RESISTANCE TO MOTION FOR A NEW TRIAL.

Comes Now the plaintiff, United States of America, and resists the Motion for New Trial. Each and all of the points raised in that motion were raised in connection with rulings by the Court during trial. No new reasoning has been advanced to support any of these points, and the Court's original rulings are fully supported by the law and by the record.

Accordingly, for the foregoing reasons, plaintiff respectfully requests that the defendant's Motion for New Trial be overruled.

ALLEN L. DONIELSON,  
*United States Attorney*

/s/ PAUL A. ZOSS,  
Paul A. Zoss,  
*Assistant U. S. Attorney,*  
113 U. S. Courthouse,  
Des Moines, Iowa 50309,  
Telephone: (515) 284-4400.



## IN THE UNITED STATES DISTRICT COURT

\* \* (Title Omitted in Printing) \* \*

## ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards; second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code, a guilty verdict offends due process in that jurors were not questioned on the subject before being impanelled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too

much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. *United States v. Hill* (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of *United States v. Danley* (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from *Hamling v. United States* (1974), 418 U. S. 87, 105:

The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence



in this case as to what constitutes a contemporary community standard and how much such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pre-trial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [*Roth v. United States*, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". *Ginzburg v. United States* (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, *United States v. Manarite* (2d Cir., 1971), 448 F. 2d 583 and *United States v. Wild* (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, IT IS HEREBY ORDERED that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,  
W. C. Stuart,  
U. S. District Judge Southern  
District of Iowa.

UNITED STATES DISTRICT COURT.

\* \* (Title Omitted in Printing) \* \*

JUDGMENT AND PROBATION/COMMITMENT ORDER.

In the presence of the attorney for the government the defendant appeared in person on this date October 14, 1975.

*Counsel*

☐ Without counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ With Counsel C. A. Frerich

*Plea*

☐ Guilty, and the court being satisfied that there is a factual basis for the plea, ☐ Nolo Contendere, ☒ Not Guilty.

There being a verdict of ☐ Not Guilty, Defendant is discharged; ☒ Guilty.

*Finding & Judgment*

Defendant has been convicted as charged of the offense(s) of violation of Title 18, Sections 1461 & 2, U. S. Code; as charged in counts 1, 2, 3, 4, 5, 6 and 7, in the Indictment filed herein:

*Sentence or Probation Order*

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and



ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.; and on condition that the defendant be confined in a jail type or treatment institution for a period of six (6) months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for three (3) years, on count 1. The defendant while on probation will be subject to all the rules and regulations and the statutes governing probation and probationers and will be under the supervision of the United States Probation Officer of this court for such period. Title 18, Section 3651, U. S. Code. On each of counts 2, 3, 4, 5, 6 and 7, the same sentence as imposed under count 1, to run concurrently with count 1.

The defendant was advised of his right to appeal. Bond on Appeal is \$5,000.00 Own Recognizance.

/s/ M. STUART,  
*United States District Judge.*

10-14-75.

IN THE UNITED STATES DISTRICT COURT.

\* \* (Title Omitted in Printing) \* \*

### NOTICE OF APPEAL.

Notice is hereby given that Jerry Lee Smith, defendant above-named, hereby appeals to the United States Court of Appeals for the Eighth Circuit the judgments of guilty rendered by the jury herein and the sentence imposed by the Court on the 14th day of October, 1975, and from all orders and judgments inherent therein.

Dated October 14, 1975.

/s/ JERRY LEE SMITH,  
Jerry Lee Smith,  
*Defendant,*

/s/ C. A. FRERICHS,  
C. A. Frerichs,  
*Attorney for Defendant,*  
Fulton, Frerichs & Nutting,  
616 Lafayette Street, P. O.  
Box 2427,  
Waterloo, Iowa 50705.

10-15-75: I hereby certify that I mailed a copy of the foregoing Notice of Appeal to Allen L. Donielson, U. S. Attorney; and Paul A. Zoss, Assistant U. S. Attorney, Room 113 U. S. Courthouse E. 1st & Walnut Streets, Des Moines, Iowa 50309, attorneys for plaintiff; and to Virgil Moore, 2454 SW 9th, Des Moines, Iowa 50315; and Mr. C. A. Frerich, 616 Lafayette, Waterloo, Iowa 50705 attorneys for defendant.

R. E. Longstaff,  
*Clerk.*

/s/ GERTRUDE DANIELS, *Deputy Clerk.*  
Copy to Court Reporter Melvin Durgin.



## IN THE UNITED STATES DISTRICT COURT.

\* \* (Title Omitted in Printing) \* \*

## STATEMENT OF THE CASE.

1. By virtue of an indictment filed March 26, 1975, defendant was charged with seven counts of placing non-mailable matter in the United States Mails in violation of Title 18, United States Code, Section 1461 and 2.

2. Trial commenced on September 8, 1975, and the jury reached a verdict of guilty on all seven counts on September 9, 1975.

3. On October 14, 1975, defendant was sentenced to a term of three years imprisonment on each count; all but six months of this term was suspended. The defendant was also sentenced to three years probation on each count. The sentences on each count were to run concurrently. On the same day, defendant filed his appeal.

4. Prior to the selection of the jury, on September 8, 1975, defendant filed a list of proposed questions for prospective jurors, a copy of which is attached hereto. The court accepted in substance Requested Instruction No. 1 but denied all other requests. In addition, the trial court denied defendant the right to make oral inquiries of a similar nature to the jury. The transcript of the Voir Dire is made a part of this record for appeal.

5. Evidence offered by the Government established the following facts:

a. At Des Moines, in the Southern District of Iowa, on or about February 1, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 4 and 4A.

b. At Des Moines, in the Southern District of Iowa, on or about June 25, 1974, defendant knowingly did cause

to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 10, 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10I, 10J, 10K, 10L, 10M, 10N, 10O, 10P, 10Q, and 10R.

c. At Des Moines, in the Southern District of Iowa, on or about June 27, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 6, 6A, 6B, 6C, 6D, 6E, 6F, 6H, 6I, 6J, 6K, 6L, 6M, 6N, 6O, and 6P.

d. At Des Moines, in the Southern District of Iowa, on or about July 10, 1974, defendant knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 12, 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, 12I, and 12J.

e. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, defendant knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 14, 14A, 14B, and 14C.

f. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 7 and 7A.

g. At Des Moines, in the Southern District of Iowa, on or about October 2, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 8 and 8A.

6. Further evidence offered by the Government established that the names and addresses of the addressees listed in Paragraph 2 above are fictitious. All mail sent to these names and addresses was delivered through the postal system to the Postmaster serving each address.

7. It is stipulated by the parties that the communities of Des Moines, Iowa, Guthrie Center, Iowa, and Mount Ayr,



Iowa, are all located within the Southern Judicial District of Iowa in the Federal judicial system.

8. Evidence offered by the defendant established the following facts:

a. Trial Exhibits A, A-1, A-2, and A-3 were available for purchase by adults at the Davenport Swingers World, Inc. Book Store in Davenport, Iowa on August 8, 1975.

b. Trial Exhibits B, B-1, B-2, B-3 and B-4 were available for purchase by adults at the Adult Dream Book Store in Des Moines, Iowa on August 12, 1975.

c. Trial Exhibits C, C-1, C-2 were available for purchase by adults at the Bachelors Library in Des Moines, Iowa on August 12, 1975.

d. Trial Exhibits D and D-1 were available for purchase by adults at the Adult Center Book Store in Des Moines, Iowa on August 12, 1975.

e. Trial Exhibits E and E-1 were available for purchase by adults at the Red Eye Book Store in Des Moines, Iowa on August 12, 1975.

f. Trial Exhibits F, F-1 and F-2 were available for purchase by adults at the Discount Adult Book Store in Davenport, Iowa on August 14, 1975.

g. Pursuant to stipulation of the parties as to foundation Trial Exhibit G, a copy of Chapter 725 of the Iowa Code, was introduced into evidence.

h. Pursuant to stipulation of the parties as to foundation Trial Exhibit H (advertisements appearing in the *Des Moines Register and Tribune* for May 22, 1975) was introduced into evidence.

i. Pursuant to stipulation of the parties as to foundation Trial Exhibit I (advertisements appearing in the *Des Moines Register and Tribune* for June 4, 1975) was introduced into evidence.

j. Pursuant to stipulation of the parties as to foundation Trial Exhibit J (advertisements appearing in the *Des Moines Register and Tribune* for August 15, 1975) was introduced into evidence.

k. Pursuant to stipulation of the parties as to foundation Trial Exhibit K (advertisements appearing in the *Des Moines Register and Tribune* for August 15, 1975) was introduced into evidence.

1. Pursuant to stipulation of the parties as to foundation Trial Exhibit L (advertisements appearing in the *Des Moines Register and Tribune* for August 16, 1975) was introduced into evidence.

m. Pursuant to stipulation of the parties as to foundation Trial Exhibit M (advertisements appearing in the *Des Moines Register and Tribune* for August 22, 1975) was introduced into evidence.

8. At the conclusion of the Government's case, defendant dictated into the record a motion for judgment of acquittal. Defendant renewed his motion at the close of all the evidence. A transcript of said motions and the Court's rulings thereon are attached hereto.

9. Prior to sentencing, on September 17, 1975, defendant filed a motion for a new trial, a copy of which is attached hereto. This motion was denied by Order dated October 14, 1975, a copy of which is attached hereto.

10. The parties agree that all trial exhibits referred to herein shall constitute a part of the record on appeal.



STATEMENT OF POINTS RAISED BY APPELLANT  
IN THIS APPEAL.

Under the circumstances of this case:

(1) The Court erred in refusing defendant's requested questions for prospective jurors and refusing to allow defendant to make similar inquiries.

(2) The Court erred in not granting defendant's motions for judgment of acquittal made at the conclusion of the government's evidence and at the close of all evidence.

(3) The Court erred in not granting defendant's motion for a new trial.

/s/ ALLEN L. DONIELSON,  
Allen L. Donielson,  
*United States Attorney*  
113 U. S. Courthouse,  
Des Moines, Iowa 50309,  
Tel: 515-284-4400,

/s/ C. A. FRERICHs,  
C. A. Frerichs,  
616 Lafayette Street,  
Waterloo, Iowa 50705,  
*Attorney for Defendant.*

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

St. Louis, Mo. 63101

February 13, 1976

Mr. C. A. Frerichs  
Fulton, Frerichs & Nutting  
616 Lafayette Street  
Waterloo, Iowa 50705  
Hon. Allen L. Donielson  
and Mr. Paul A. Zoss  
Office of U. S. Attorney  
113 U. S. Courthouse  
Des Moines, Iowa 50309

Ms. Kathleen H. Wall  
& Messrs. Tefft W. Smith  
& William D. North  
Kirkland & Ellis  
200 East Randolph Drive  
Chicago, Illinois 60601

Re: No. 75-1802. United States v. Jerry Lee Smith.

Dear Sir:

Enclosed herewith, for use of counsel, copy of the opinion of this Court filed today in the above case. Judgement of this Court in accordance with the opinion is also entered today.

Very truly yours,

/s/ ROBERT C. TUCKER  
Robert C. Tucker

*Clerk*

vk

enc.

P. S. The opinion will not be printed or published in accordance with directions received from the Court.



UNITED STATES COURT OF APPEALS  
For the Eighth Circuit

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No. 75-1802

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JERRY LEE SMITH, d/b/a Intrigue, <i>Appellant,</i>	} Appeal from the United States District Court for the Southern Dis- trict of Iowa.
vs.	
UNITED STATES OF AMERICA, <i>Appellee.</i>	

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Submitted: January 15, 1976

Filed: February 13, 1976

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Before CLARK, *Associate Justice*, Retired,\* BRIGHT and  
HENLEY, *Circuit Judges*.

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PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

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\* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law \* \* \* a legal term of art," *Hamling v. United States*, 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or "average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are in-born and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here



were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States v. Danley*, 523 F. 2d 369 (9th Cir. 1975), and *United States v. Hill*, 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling v. United States*, 418 U. S. 87 (1974), where the Chief Justice wrote:

A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## CHAPTER 725.

### OBSCENITY AND INDECENCY.

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. "*Obscene material*" is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. "*Material*" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. "*Disseminate*" means to transfer possession, with or without consideration.

4. "*Knowingly*" means being aware of the character of the matter.

5. "*Sado-masochistic abuse*" means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. "*Minor*" means any person under the age of eighteen.

7. "*Sex act*" means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.



**725.2 DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS.** Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

**725.3 ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED.** Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

**725.4 CIVIL SUIT TO DETERMINE OBSCENITY.** Whenever the county attorney of any county has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

**725.5 EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS.** Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display or art works or the use of any materials in any public library.

**725.6 SUSPENSION OF LICENSES OR PERMITS.** Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits of any conviction under section 725.2 or 725.3.

**725.7 EVIDENCE CONSIDERED.** At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.
2. The degree of public acceptance within the community of the material or material of similar character.
3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.
4. The advertising promotion and other circumstances relating to the sale of the material.

**725.8 AFFIRMATIVE DEFENSE.** In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

**725.9 UNIFORM APPLICATION.** In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene



material shall be under the provisions of these sections, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.